SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-95
Lower Tribunal No. 20-CF-000868

RYAN MICHAEL LITTLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court for Lee County.
Robert Branning, Judge.

June 12, 2023

PER CURIAM.

AFFIRMED.

STARGEL and WHITE, JJ., concur.
COHEN, J., dissents, with opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED

COHEN, J., dissenting, with opinion.

Ryan Little appeals the judgment of guilt and sentence for possession of a firearm by a convicted felon, pursuant to section 790.23, Florida Statutes (2020).[1] He contends the evidence presented by the State at trial was insufficient to support his conviction.

When evaluating whether there is sufficient evidence to sustain a conviction, we view the evidence in a light most favorable to the State, accepting as true the facts established by the evidence, as well as every conclusion that a jury might fairly and reasonably infer from the evidence. *See Robinson v. State*, 327 So. 3d 903, 904 (Fla. 1st DCA 2021). According to the State's evidence, on September 22, 2020, Detective Drake, a narcotics detective with the Lee County Sheriff's Office, pulled Little over for not wearing a seatbelt. A passenger was in the car with Little. According to Drake, Little was nervous and breathing heavily. His left leg was shaking, and he was moving it around "suspiciously," although Drake did not offer any explanation as to what made the moving leg "suspicious."

Drake said he saw four or five inches of what he believed to be the handle of a firearm under the driver's seat near Little's left foot. Drake radioed his partner, Detective Jennings, to respond to the scene with his K-9. The K-9 was trained to

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

alert on specific controlled substances, not on the presence of firearms or explosives. Jennings walked the dog around the vehicle, and the dog alerted on the car. The car was searched, and the firearm was found. The record does not reflect the discovery of any drugs.

After locating the firearm, Drake detained Little, who was upset and crying as he was walked back to the patrol vehicle. Little stated that the gun was his father's, and he did not want to get into any trouble for it. Drake took swabs from the firearm for DNA testing, but he did not submit them to a lab. Ronald Little, Appellant's father, arrived at the scene and told Drake that he owned both the car and the firearm and that the situation "was completely my fault."

At trial, Little's father reiterated that he was the owner of both the car and the firearm. He testified that he purchased the gun a few weeks before his son's arrest.[2] He usually kept the gun in his nightstand, but he placed it in the car to take to the firing range. That plan was interrupted when he was called away for work[3] and, before driving off in his work vehicle, he moved the gun from the passenger seat to underneath the driver's seat. He acknowledged initially telling Drake he left the gun on the passenger's seat but later remembered having put the gun under the driver's seat.

[2] His receipt for the purchase of the gun was admitted into evidence.

[3] The elder Little was retired and on social security but had a side business cleaning carpet.

Little's father said that, at the time of arrest, the driver's seat was all the way back, consistent with its setting when his son drives the car. When the senior Little drove, he positioned the seat forward, which completely covered the gun from sight. The gun would become visible only after his son would have adjusted the seat to drive.

Because Little did not have actual possession of the firearm, the State was required to prove constructive possession. To do so, the State needed to show, beyond a reasonable doubt, that Little knew of the presence of the firearm and was able to exercise control over it. *See Watson v. State*, 961 So. 2d 1116, 1117 (Fla. 2d DCA 2007).

The State established the following: (1) the firearm was located under the driver's seat, with the handle partially exposed; (2) Little was nervous and shaking and moving his leg around; and (3) Little stated the firearm was his father's and he did not want to get into trouble for it.

Little's location in the driver's seat, though establishing that the firearm was nearby, is insufficient to prove constructive possession. No independent proof connecting Little to the firearm was presented – no fingerprints, no testimony by the vehicle's other occupant, and no incriminating statements from Little. *See Rangel v. State*, 110 So. 3d 41, 44 (Fla. 2d DCA 2013). Pretrial statements of the accused, witness testimony, or scientific evidence are typically required to establish

constructive possession beyond mere proximity. *See, e.g.*, *Meme v. State*, 72 So. 3d 254, 256-57 (Fla. 4th DCA 2011) (holding that proximity to the contraband, nervousness, and *incriminating statements* together established sufficient evidence of constructive possession).

Little's nervousness is a factor to consider, but, by itself, it is insufficient. *See Hill*, 736 So. 2d at 134 (holding that nervousness and proximity to contraband was insufficient where nervousness could be explained by being stopped for speeding); *see also Brown v. State*, 8 So. 3d 1187, 1189 (Fla. 4th DCA 2009) (holding evidence insufficient to sustain constructive possession conviction of Xanax where nervousness could be attributed to defendant being pulled over when he was in actual possession of cocaine); and *Jennings v. State*, 124 So. 3d 257, 263 n.3 (Fla. 3d DCA 2013) (noting that nervousness "alone is insufficient evidence of knowledge of contraband in a vehicle," although it is a factor the trier-of-fact may consider). Almost everyone pulled over by law enforcement is nervous; nervousness is of little probative value.

The vehicle was jointly occupied, the gun and vehicle were both owned by Little's father, and, when the seat was adjusted for Little's father, the gun would not have been visible when Little entered the vehicle. Under these facts, Little's conviction cannot stand. I would reverse.

Howard L. “Rex” Dimmig, II, Public Defender, and Lisa B. Lott, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Elba Caridad Martin, Assistant Attorney General, Tampa, for Appellee.